

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKY LEE MCCLINTON,

Defendant-Appellant.

UNPUBLISHED

January 14, 2003

No. 231968

Calhoun Circuit Court

LC No. 00-002897-FC

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, third offense, MCL 769.12, to a prison term of thirty-eight to sixty years for the assault with intent to murder conviction, and to a two-year consecutive prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

This case arises out of the shooting of defendant's wife, Patricia McClinton. Patricia testified that she and defendant were arguing and the police were called to their residence. The police arrived and discussed the situation with the couple, then left and parked in a parking lot about one block from the residence. Defendant and Patricia soon started arguing again and defendant retrieved a gun. While Patricia was calling 911, defendant came up behind her and told her that if the police answered the phone he was going to kill her. When the police answered, defendant shot Patricia five times. Patricia identified defendant as the shooter to the 911 operator.

Police officers observed defendant leave the residence in his vehicle at the same time that they received a report of a shooting at that location over their radio. One of the officers followed defendant and apprehended him. In retracing defendant's route, another officer discovered a five-shot revolver with five spent casings inside that was identified by Patricia at trial as being very similar to defendant's gun.

I

Defendant asserts that he was denied the effective assistance of counsel on five occasions. A claim of ineffective assistance of counsel must be preceded by an evidentiary hearing or motion for new trial before the trial court, or will be considered by this Court only to

the extent that claimed counsel mistakes are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). Because defendant did not move for a new trial, the arguments will be considered only to the extent that errors are apparent on the record.

Defendant first argues that defense counsel erred by failing to move for a mistrial after Officer Horn testified that the police had been in contact with defendant and Patricia on several occasions in the past. Horn's remarks did not implicate defendant in any crime, nor did they necessarily lead the jury to conclude that he had previously engaged in prior bad acts or domestic violence. Instead, the remarks merely explained the officers' continued presence near the residence. Therefore, any motion for a mistrial would not have been granted. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next argues that defense counsel's failure to move for a continuance in order to test bloodstains found at the crime scene deprived defendant of the substantial defense that he did not shoot his wife. There is nothing in the record to suggest that the blood belonged to anyone other than Patricia, and because this crime involved a shooting there is no reason to believe that the perpetrator's blood would be found at the scene. Nothing in the record indicates that the results of the blood test would have exonerated defendant. Counsel is not required to advocate a meritless position. *Snider, supra* at 425.

Defendant next asserts that he was denied a substantial defense by defense counsel's failure to argue that defendant was not the shooter. A defendant is entitled to have his attorney prepare, investigate, and assert all substantial defenses. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A substantial defense is one that may have made a difference in the outcome of the trial. *Id.* In the present case, defendant provides no evidence to support his contention that someone else was in the house on the night of the shooting, nor is there any evidence in the record that there was anybody else in the house. Further, defendant's own wife identified him as the shooter both during the 911 call and immediately thereafter. Defendant has failed to so demonstrate that he was denied a substantial defense.

Defendant also contends that defense counsel failed to object when the trial court instructed the jury that "you *must* consider the fact that defendant did not testify" [emphasis added]. Whether the jury instruction was erroneous as given to the jury, or whether the transcriptionist merely made an error is unknown to this Court. There is some debate as to whether this was actually what the trial court said. If the error was in the transcription, and the jury was given the proper instruction, then this issue is moot. However, even if the error was in the instruction, defendant has failed to persuade us that this error affected the outcome of the trial. The evidence against defendant was overwhelming, and defendant has not explained how the consideration by the jury of defendant's failure to testify would have impacted the verdict.

Defendant's final argument with respect to ineffective assistance of counsel is that defense counsel should have presented the testimony of Tina Wyrick. The existing record contains no mention of Tina Wyrick and, therefore, does not permit review of this argument.¹

¹ Defendant has attached to his appellate brief an affidavit from Wyrick. However, we may not
(continued...)

II

Defendant contends that the trial court abused its discretion when it allowed Horn to express his personal opinion that defendant was the shooter. Contrary to defendant's assertion, Horn's testimony that he drew his weapon when effectuating defendant's arrest because he believed that if defendant "was willing to shoot his wife, he would shoot me" did not constitute an opinion concerning defendant's guilt, but rather explained his actions on the night of the crime. We find no abuse of discretion in the trial court's decision to admit this evidence. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

III

Last, defendant asserts that the cumulative effect of errors in this case denied him a fair trial. In order to reverse on grounds of cumulative error, there must be errors of consequence that are seriously prejudicial to the point that defendant was denied a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). Prejudicial error has not been identified in this case and absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald

(...continued)

consider the proposed testimony contained in the affidavit because generally, this Court's review is limited to the record of the trial court or administrative tribunal, *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990), and it will allow no enlargement of the record on appeal. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).